

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

SKYLER LEEPER

APPELLANT,

**v.
ANDY ASMUS**

RESPONDENT.

DOCKET NUMBER WD76772

DATE: May 27, 2014

Appeal From:

Morgan County Circuit Court
The Honorable G. Stanley Moore, Judge

Appellate Judges:

Division One: Cynthia L. Martin, Presiding Judge, Mark D. Pfeiffer, Judge and Karen King Mitchell, Judge

Attorneys:

Paul L. Redfearn III and Michael D. Wallis, Independence, MO, for appellant.

Byron A. Bowles, Jr. and Gregory T. Cook, St. Louis, MO, for respondent.

MISSOURI APPELLATE COURT OPINION SUMMARY

**MISSOURI COURT OF APPEALS
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SKYLER LEEPER,

APPELLANT,

v.

ANDY ASMUS,

RESPONDENT.

No. WD76772

Morgan County

Before Division One: Cynthia L. Martin, Presiding Judge, Mark D. Pfeiffer, Judge and Karen King Mitchell, Judge

This is an appeal from the trial court's dismissal of Skyler Leeper's amended petition for failure to state a claim. Leeper alleged that his co-employee, Andy Asmus breached a personal duty of care owed to Leeper when Asmus failed to perform his job duties in the safe manner in which he had been directed, causing Leeper's injuries. Because Leeper's amended petition sufficiently alleges facts to support the existence of a personal duty of care at common law, the trial court's judgment dismissing Leeper's action with prejudice is reversed and this cause is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED

Division One holds:

1. For workplace injuries subject to the 2005 amendment of the Workers' Compensation Act, injured employees can separately pursue a cause of action against negligent co-employees so long as the co-employee owed the injured employee a duty of care at common law. Under the common law, a co-employee's personal duties to fellow employees do not encompass a legal duty to perform the employer's nondelegable duties.

2. Before a court can determine whether a co-employee owes a duty in negligence at common law (a question of law), it must first be determined whether the workplace injury is attributable to the employer's breach of a nondelegable duty, a question of fact unique to the workplace.

3. The "something more" test as originally announced in *State ex rel. Badami v. Gaertner*, 630 S.W.2d 175, 180 (Mo. App. E.D. 1982) was indistinguishable from the common law--with one exception. *Badami's* characterization of a co-employee's actionable negligence as "something more" focused attention on the nature and attributes of the co-employee's conduct. In contrast, the common law focused attention on the employer's conduct. Post-*Badami* refinements of the "something more" test have attached legal significance to this difference in focus.

4. Post-*Badami* refinements of the "something more" test operate to immunize co-employees from liability for ordinary negligence by narrowing recovery outside the exclusivity of the Act to outrageous or reckless conduct directed at a particular employee.

5. The post-*Badami* refinements of the "something more" test were fashioned at a time when section 287.800 required liberal construction of the Act. However, section 287.800 was amended in 2005 to require strict construction of the Act. The judicial construct of "something more," which evolved over time to sweep most co-employee conduct into the exclusivity of the Act, was abrogated, restoring co-employee negligence claims as existed at common law.

6. The "something more" requirement that a co-employee only and always owes an actionable duty in negligence if the co-employee commits a purposeful, affirmative act directed at a fellow employee has no common law origin.

7. The refined "something more" test can impose on a co-employee a duty in negligence when no duty would have been imposed at common law, and can fail to impose a duty when a duty would have been imposed at common law.

8. We conclude that for workplace injuries occurring between the effective dates of the 2005 and 2012 amendments of the Act, the common law, and not the refined "something more" test, must be applied to determine whether a co-employee owes a duty of care in negligence. For workplace injuries within that time frame, it must first be determined whether a workplace injury is attributable to a breach of the employer's nondelegable duties. If yes, then a co-employee's negligent act or omission will not support a personal duty of care in negligence as a matter of law, regardless whether the act or omission can be characterized as "something more." If no, then a co-employee's negligent act or omission may support an actionable duty of care in negligence, regardless whether the act or omission can be characterized as "something more." Determining whether a workplace injury is attributable to a breach of the employer's nondelegable duties is a question of fact.

9. Leeper's amended petition alleges sufficient facts to establish an independent duty of care owed by a co-employee at common law. The trial court erred in dismissing the amended petition with prejudice for failure to state a claim.

Opinion by Cynthia L. Martin, Judge

May 27, 2014

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